Luxembourg's Unworkable Test to Protect the Rule of Law in the EU

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A key rule of law case illustrating the conversation taking place between national judges and the Court of Justice about the how-to of rule of law protection is the CJEU's *LM* ruling dealing with the implementation of the European Arrest Warrant (EAW) (July 2018; for analysis, see here). In it the CJEU developed a test to balance mutual trust and individual rights, particularly the right to a fair trial. The *Rechtbank* Amsterdam, more specifically its international legal assistance chamber (*Internationale Rechtshulpkamer*), and the Karlsruhe *Oberlandesgericht* applied Luxembourg's *LM* test with respect to Polish suspects in a series of recent (interlocutory) rulings. This national case-law is interesting both for its immediate outcome (suspension of surrenders) and its implicit message to Luxembourg: "Sorry, we tried, but your test is unworkable."

Our analysis will proceed in two parts. We first examine how "Amsterdam" laboured extensively to make the *LM* test work, but eventually showed its unworkability (Part I). We will then turn to how "Karlsruhe" side-lined *LM*, and describe how "Amsterdam" seems now to be following the German case-law. Finally, we make some general observations about why we should indeed be heading for a post-*LM* era as soon as possible, with special regard to the CJEU's own case-law resulting from infringement proceedings (Part II).

Test and context: LM, first evidence of its unworkability and subsequent Polish CJEU cases

The principle of mutual trust underlying mutual recognition in applying EAWs assumes that, however different the substantive and procedural criminal laws across EU Member States, all suspects will get a fair trial and a verdict delivered by an independent judiciary, wherever they are. The Framework Decision (FD EAW) has a very rigid understanding of trust, obliging Member States to almost automatically recognize judicial decisions. The only exception is when the sanctioning prong of Article 7 TEU (current paragraphs (2) and (3)) gets operationalised (recital 10 FD EAW), which never happened and is unlikely to happen in the foreseeable future.

But then came the Article 7(1) TEU procedure against Poland, and with it the question of whether and how real-life events put pressure on the assumption of all-is-well-over-there. The CJEU remained extremely cautious in *LM.* After a reaffirming the centrality of mutual recognition (paragraph 37) while at the same time acknowledging that the right to an independent and impartial tribunal is part of the very essence of the right to a fair trial (Article 47 Charter) that can never be breached

(paragraph 59), it devised a test. Pleas based on independence of the judiciary need to be assessed by national courts based on a two-pronged (three-step) test:

1. Is there a real risk, connected with a lack of independence of the courts of the issuing Member State on account of systemic or generalised deficiencies, of the fundamental right to a fair trial being breached on the basis of material that is objective, reliable, specific and properly updated? (paragraph 61)

2. If so, based on specific and precise indications in the particular circumstances of the case, and if necessary based on supplementary information requested from and subsequently provided by the issuing judicial authority, specifically an examination of

> *(a) the impact of the systemic and generalised deficiencies at the level of the courts with jurisdiction over the proceedings to which the requested person will be subject, and*
>
> *(b) the personal situation, nature of the offense, and the factual context forming the basis of the EAW in the light of specific concerns expressed by the individual concerned and any information provided by him*

are there substantial grounds for believing that, following the surrender to the issuing Member State, the requested person will run the risk of her right to a fair trial being breached? (paragraphs 68, 74-76)

It does not take much imagination to see how a domestic judge in an executing Member State can be caught between the rock of implementing Union law and the hard place of protecting the rights of the individuals for whose fate (s)he, as a judge, has responsibility. And, indeed, practice has borne out these complications in very real ways (and with very real consequences). Already before *LM* it had not been uncommon that domestic judges opted for non-surrender or demanded assurances, even in violation of the FD EAW (see here for many cases before 2016). In the immediate follow-up to *LM* in Ireland, there was already the impression that the test was highly problematic. The Irish judge was not capable of halting surrender despite her evident conviction that courts are not independent in Poland (High Court of Ireland, *Minister for Justice v. Celmer, (No. 5)* [2018] IEHC 639, 19 November 2018). There is further evidence of the unworkability of the test. The *Oberlandesgericht* Karlsruhe in its judgment of 7 January 2019 (Ausl 301 AR 95/18) made surrender to Poland dependent on the German embassy being allowed to take part in the trial in Poland and visit the defendant in custody. On this blog, Maximilian Steinbeis (rightly) called this an elegant solution. But let us also add that the German court technically reverted to traditional forms of extradition, which is *contra legem* as a matter of Union law.

In the meantime, since *LM,* matters in Poland have gone from bad to worse. The first relevant judgment of the CJEU was *Commission versus Poland* (C-619/18). The court took into account the political context of rule of law backsliding and the opinions of the Venice Commission on several aspects of judicial capture in order to conclude that the new rules of judicial retirement were not in line with EU law. Another infringement Case C-192/18 on the independence of ordinary judges was

decided along similar lines. Rulings in *AK* (C-585/18; see for comment here and here), *Miasto #owicz* (C-558/18 and C-563/18; see for comment here and here) and recently the interim measures in *Commission v Poland* (C-791/19; see here for comment) have all confirmed the CJEU's vision of just how fundamental the right to fair trail, and the prerequisite of independent and impartial national judges, is for Union law. One of the measures among the many attacks on judicial independence in Poland, that has not yet been met with infringement action, stands out: the muzzle law that was described by leading EU law experts as one that "bars judges from […] ensuring observance for effective judicial protection, [preventing] judges from controlling the validity of judicial appointments and from criticizing authorities" applicable to all Polish judges shows the executive's direct influence over courts and therefore calls into question the independence of every single national judge.

Judicial Q&A and FAQs: Rechtbank Amsterdam's rulings part 1 (July 2018-February 2020)

One court, Amsterdam *Rechtbank's* international legal assistance chamber, the dedicated chamber dealing with all EAW cases in the Netherlands, engaged in great detail with *LM*, and can be seen as a case-study (all of the cases discussed can be accessed here). Engagement with *LM* started even *before* Luxembourg's ruling. Two weeks after the Irish court asked preliminary questions (on 12 March 2018), the Amsterdam Court already referred to these questions (ECLI:NL:RBAMS:2018:2124, of 27 March 2018). It halted substantive dealings with Polish EAWs as of April 2018 awaiting the CJEU ruling (see ECLI:NL:RBAMS:2018:4720, of 5 July 2018). A few weeks after *LM,* it then meticulously summarised the CJEU's test (ECLI:NL:RBAMS:2018:5925, 16 August 2018, paragraph 6.4.2), and planned a further hearing to ask the prosecutor and the defence to go into each of the sub-questions. A next development in the same case was an interlocutory ruling of 4 October 2018, in which the court suspended proceedings to clarify implications of a number of new changes in the organisation of the judiciary in Poland (ECLI:NL:RBAMS:2018:7032). Relying on documentation of the Council of Europe's Venice Commission and GRECO Committee, as well as the OSCE and European Network of Councils for the Judiciary, it answered the first *LM*-question in the affirmative (general/systemic deficiencies). With regard to the second prong, it formulated 13(!) questions for the prosecutor to ask from the Polish issuing authorities. It took the same line in a different case shortly afterwards (ECLI:NL:RBAMS:2019:393, 18 January 2019).

In subsequent rulings the court clarified that it received answers from Polish authorities, but that these did not enable it to give a proper answer to both *LM*-test questions of the second prong (ECLI:NL:RBAMS:2019:2391, 29 January 2019; and ECLI:RBAMS:2019:982, 14 February 2019). It proceeded to ask, respectively, 6 and 5 follow-up questions. In September 2019 it concluded, based on answers received from Polish authorities in several cases, that from that moment on it would *assume* that question 2a of the *LM*-test should be answered in the affirmative in *all* Polish EAW cases (ECLI:RBAMS:7161, 27 September 2019, paragraph 8.1). Questions should, however, continue to be asked of Polish authorities that were also relevant

for establishing answers to question 2b. Rather than posing all 13 questions it meant that just the following 4 need to be asked:

a/ which judicial authorities are concretely competent for the procedures to which the individual in question is subject, both in first instance and on appeal?

For each of these judicial authorities (and as of when legislative changes entered into force)

b/ have there been disciplinary procedures against judges? If so, what has been the outcome?

c/ have there been changes in the remuneration? If so, why?

d/ have any other measures been taken, e.g. ‘written remarks’ by the Minister of Justice? If so, why?

Although at first sight this seems a highly impressive application of *LM*, this development did not directly benefit the suspects concerned. The court in *none* of the cases proceeded to answer question 2b in the positive, insisting repeatedly that it was for the (defence of the) suspect to make the case that the suspect would face detrimental consequences to fair trial in the specific case at hand. Very often, this type of defence was not even put up (see, e.g. ECLI:NL:RBAMS:2019:3834, 28 May 2019; ECLI:NL:RBAMS:2019:7277, 23 July 2019; ECLI:NL:RBAMS:2019:8383, 5 November 2019; ECLI:NL:RBAMS:2019:9907, 12 December 2019). Sometimes a more substantive argument was tried, but was then considered to fall short, so that the surrender to Poland under the EAW was authorised anyway (see, e.g. ECLI:NL:RBAMS:2019:2722, 16 April 2019; ECLI:NL:RBAMS:2019:8020, 10 October 2019).

In January 2020 the court summarised this line of cases. Noting that cases often got delayed by waiting for answers from Polish authorities, while so far none of the proceedings had resulted in subsequent positive answers to question 2b, it ruled that there was no point in waiting for answers if they were delayed. Instead, the court would simply interrogate the individual during the hearing and focus on whether s/he could provide evidence for question 2b to be answered in the positive (ECLI:NL:RBAMS:2020:184, 16 January 2020). In a different case the court repeated its earlier finding that detention conditions in Poland do not themselves amount to a violation of Article 4 Charter of Fundamental Rights, blocking surrender on that alternative substantive ground (ECLI:NL:RBAMS:2020:741, 10 February 2020). All of this simply reinforces the impression that, paradoxically, it is extremely hard, if not impossible for a suspect to prove individual harm to be expected in his or her case within overall context of documented systematic problems with judicial independence in Poland.

This previously unexplored extensive case-law of the Amsterdam court simply underlines the unworkability and complete ineffectiveness of the *LM*-test from one of the viewpoints for which it was developed: protecting the essence of the right to a fair trial. Three very significant rulings followed on 24 and 26 March 2020, however.

They appear to mark a new development in the *Rechtbank* Amsterdam's thinking. As they refer to and build on the ruling of 17 February of the *Oberlandesgericht* Karlsruhe, these developments will be discussed together, in Part II.
